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# Supreme Court of the United States

OCTOBER TERM, 1972

72-214

**THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,**

**Appellants,**

**v.**

**THE WICHITA BOARD OF TRADE, et al.,**

**Appellees.**

**On Appeal From The United States District Court For The District Of Kansas**

## JURISDICTIONAL STATEMENT


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**Appellees.**

---

**On Appeal From The United States District Court For The District Of Kansas**

## JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Kansas, entered on June 8, 1972, suspending rates found just and reasonable by the Interstate Commerce Commission, which judgment was stayed by order of this Court entered July 7, 1972, pending determination of this appeal. Appellants submit this Statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

## OPINIONS BELOW

The opinion of the District Court for the District of Kansas is not yet reported. The opinion of Division 2 of the Interstate Commerce Commission is reported at 339

I.C.C. 364 (1971), and was affirmed by the Commission *en banc* in an opinion reported at 340 I.C.C. 69 (1971). Copies of the opinions of Division 2, the Commission *en banc*, and the District Court are attached hereto as Appendices A, B and C.*

## JURISDICTION

This suit was brought under 28 U.S.C. § 1336 to set aside an order of the Interstate Commerce Commission. The opinion of the three-judge District Court, convened pursuant to 28 U.S.C. §§ 2325 and 2284, was issued on May 24, 1972. Appellants filed a motion for correction of opinion on May 26, 1972. On June 8, 1972, the District Court denied the motion and entered judgment. On June 9, 1972, appellants filed their notice of appeal. The jurisdiction of this Court to review the District Court's decision on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). *E.g., Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943).

## QUESTIONS PRESENTED

1. Does a District Court have jurisdiction to suspend railroad rates which the Interstate Commerce Commission had previously suspended for the maximum period provided for by statute and had found to be just and reasonable?

2. Did the Court below violate minimal standards of judicial review by basing its decision on a *dictum* in the Commission's opinion and disregarding the Commission's findings?

3. Where the Commission specifically found that the proposed charges when added to the existing line-haul rates do not exceed the maximum reasonable level, found that the

* Pages of the Appendices are cited herein as, *e.g.*, "App. A1".

accessorial service for which the charges will be made is no longer necessary to the orderly marketing of the commodity, and found that the proposed charges will make a substantial contribution toward alleviating the serious nationwide shortage of freight cars, was the Court below correct in remanding the matter to the Commission because the Commission did not require specific evidence of revenues, costs, and services as to the thousands of individual line-haul rates involved?

## STATUTE INVOLVED

Section 15(7) of the Interstate Commerce Act as amended, 49 U.S.C. § 15(7), provides as follows:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceed-

ing has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

## STATEMENT

This appeal arises out of a rate suspension proceeding conducted by the Interstate Commerce Commission under § 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7) (*supra*, pp. 3-4), and involving proposed charges for in-transit grain inspection services. The charges were suspended by the Commission for the maximum statutory seven-month period, which was voluntarily extended by the appellant railroads* for an additional six months, and then

* The appellants, railroads operating in the Western District of the United States, are enumerated in the list attached hereto as Appendix G.

went into effect. The Commission found that the charges were just, reasonable and otherwise lawful and would "make a substantial contribution toward the improvement of the national freight car supply" (App. A51).

An action to review the Commission's order was brought in the District Court by the appellees, consisting principally of certain grain dealers and exchanges. The Court remanded the matter to the Commission for further proceedings and *sua sponte* suspended the charges which had been in effect for over a year.

On July 7, 1972, this Court entered an order staying the District Court's judgment pending determination of this appeal.

**1. In-Transit Grain Inspection**

Prior to 1968, the United States Grain Standards Act, 7 U.S.C. § 71 *et seq.*, required inspection of interstate grain shipments to determine the official grade of the contents for the purpose of establishing the value of the commodity at grain markets. The inspection requirement could have been satisfied by inspection at point of origin prior to loading of the railroad cars or at point of destination after the cars had been unloaded. However, it was "convenient for grain shippers and receivers to have the grain inspected while in transit" (App. A12). This procedure involves stopping the loaded railroad cars en route, switching them to separate track facilities where they are held for sampling and grading, awaiting disposition orders from the shippers after inspection, and switching the cars back into line-haul movement. The interruption in the line-haul resulting from in-transit inspection amounts to an average delay of more than three days per inspection (App. C3, A34-42, A48).

In 1968 Congress, by amendment to the United States Grain Standards Act, eliminated the requirement of grain

inspection (P.L. 90-487, 82 Stat. 761). As stated by the Court below (App. C2), "The primary purpose of the Congress was to effect an increased utilization of rail cars."

Despite the repeal of the inspection requirement and the availability of alternative sampling methods (including recently developed automatic samplers), in-transit grain inspections continued in large numbers. In 1968 there were 464,000 in-transit inspections on 16 western railroads; in 1969, 488,000 on 15 western railroads (App. A5). During this period there also continued to be a nationwide shortage of freight cars which became critical during grain harvest periods (App. A49).

**2. The Challenged Tariffs**

In order to reduce the number of in-transit inspections and thereby increase the available car supply, the appellants filed schedules with the Interstate Commerce Commission, to become effective March 28, 1970, proposing a charge of approximately $13.50 per car for each in-transit inspection.* Appellants had previously provided the service without a separate charge, although a separate charge for in-transit inspection had been established in the East in 1963 (App. A9).

Under the proposed tariffs, the inspection charges when added to the line-haul rates would in no event exceed the maximum level of rates on grain in the West established by the Commission. These maxima, first determined by the Commission in two general investigations reported in *Grain and Grain Products*, 205 I.C.C. 301 (1934) and 215 I.C.C. 83 (1936) (referred to as Docket No. 17000, Part 7), have been subjected to continuous review and have been readjusted through subsequent general increases. As noted by the Commission (App. A33), "[t]here is possibly no segment

* The current charge is approximately $16 as a result of subsequent general revenue increases.

of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products."

### 3. The Commission Proceeding

In response to protests filed by the appellees and others, the proposed charges were suspended by the Commission pursuant to § 15(7) for the statutory seven-month period, which the appellant railroads voluntarily extended for an additional six months. On April 16, 1971, Division 2 of the Commission issued its decision finding the proposed charges just, reasonable and otherwise lawful, based on the following "chief subsidiary findings" (App. A51):

> "1. The official inspection of grain is no longer mandatory with the amendment in 1968 to the Grain Standard Act, and increased railroad freight car utilization was a consideration in that statutory revision. The statutory change coupled with evidence of record that the inspection may be omitted, made at origin, or made at destination, establishes that in-transit inspection is no longer essential to the orderly marketing of grain.
>
> "2. Pursuant to orders of this Commission in Docket No. 17000, Part 7, proceedings, a maximum reasonable level of rates on grain in the West was established. The proposed charges when added to the line-haul rates do not exceed the maximum level prescribed. Where they do, the proposed charges do not apply. Approval of the proposed charges will not contravene our prior orders. Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra.*
>
> "3. The detention and cost studies presented and discussed establish that the proposed charges are just and reasonable.
>
> "4. The establishment of the proposed charges will eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply."

The proposed charges became effective on May 4, 1971. On petitions for reconsideration, the Commission *en banc* affirmed the Division 2 decision on September 21, 1971, retaining jurisdiction to receive and consider reports which the Commission ordered the railroads to submit showing revenue derived from the inspection charges (App. B9).*

**4. The District Court Proceeding**

Appellees (less than a third of whom participated in the Commission proceeding) filed this action in the United States District Court for the District of Kansas pursuant to 28 U.S.C. § 1336 to enjoin the order of the Commission. Appellant railroads intervened in support of the order and appellee Secretary of Agriculture intervened in support of plaintiffs' complaint.

In accordance with 28 U.S.C. § 2325, the case was heard by a three-judge court. In its opinion entered May 24, 1972, the Court concluded that ". . . the Commission has not adequately explained, for purposes of our review, its departure from prior norms" (App. C6). The Court ordered the matter "remanded to the Commission for further proceedings consistent with this opinion" (App. C7). In addition, although plaintiffs-appellees had not even requested such relief, the Court below, without discussing its authority to do so, ordered that the inspection charges "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (App. C7).

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* Pursuant to this order, appellants on July 7, 1972, filed their first report with the Commission summarizing the effect of the inspection charges during the first six-month reporting period. The report shows that 25.0% of the grain shipments on the 17 carriers reporting complete data were inspected in-transit during this period as compared with 59.8% for the same six months in the year before the inspection charges took effect.

Appellants on May 26, 1972, filed a motion for correction of opinion in which they contended that the District Court had exceeded its authority by suspending the charges. By order entered June 8, 1972 (a copy of which is attached hereto as Appendix D), the District Court denied the motion.

On June 9, 1972, appellants filed in the District Court a notice of appeal (a copy of which is attached hereto as Appendix E) and a motion for stay of judgment pending determination of the appeal to this Court.* The motion was denied on June 19, 1972.

**5. The Stay Order**

Appellants thereafter applied to this Court for stay of the District Court's judgment on the grounds that the issues on appeal are significant and that the District Court's suspension of the inspection charges would result in a serious shortage of freight cars causing substantial and irreparable injury to the public, the grain industry and the railroads. Appellants proposed that the stay be conditioned on their accounting for inspection charges collected during the period of the stay and refunding such amounts in the event of affirmance. Supporting affidavits which had been submitted to the District Court were appended to the application to this Court.

On July 7, 1972, this Court entered an order, subject to an accounting and refund condition, staying the judgment of the District Court pending determination of this appeal. A copy of the order is attached hereto as Appendix F.

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* The Interstate Commerce Commission filed its notice of appeal on July 19, 1972.

## THE QUESTIONS ARE SUBSTANTIAL

Underlying each of the questions presented by this appeal is the improper interference by the Court below with the powers and responsibilities of the Interstate Commerce Commission to determine the reasonableness of rates and to deal with matters of vital importance to the national transportation system.

In suspending charges which had been in effect for more than a year, the Court below acted beyond its jurisdiction and in square conflict with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

The Court below also failed to meet the most elementary standards of judicial review by setting aside the Commission's order on the basis of a *dictum* taken out of context, by ignoring the clearly stated findings of the Commission, by imposing a "norm" which does not exist in prior decisions, and by applying a rigid rule of *stare decisis* which is inapplicable to judicial review of administrative decisions. The Court further misconceived the function and scope of Commission proceedings under § 15(7), as defined by this Court in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943).

The importance of the case is enhanced by the great public interest in relieving the "recurring shortages of freight cars available to serve the Nation's shippers". *United States* v. *Allegheny-Ludlum Steel Corp.*, ... U.S. ... (June 7, 1972).

## I. THE ORDER OF THE COURT BELOW SUSPENDING THE CHARGES WAS BEYOND ITS JURISDICTION AND IN DIRECT CONFLICT WITH THIS COURT'S ARROW DECISION.

Section 15(7) (*supra*, pp. 3-4) authorizes the Commission under certain conditions to suspend the operation of a railroad's newly filed schedule of charges "but not for a longer period than seven months beyond the time when it would otherwise go into effect". Pursuant to this provision, the challenged tariffs were suspended by the Commission for the maximum seven-month period (which the railroads voluntarily extended for an additional six months). After the rates had been in effect for more than a year, the Court below *sua sponte* suspended the charges and decreed that they "shall be ineffective until and unless otherwise ordered by" the Court below. That decision is in direct conflict with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

In *Arrow*, this Court held that § 15(7) vests in the Commission the exclusive power to suspend proposed rates and that the courts lack the power to suspend such rates or to extend the maximum suspension period provided by the statute. In considering an attempt to enjoin carrier-initiated rates which (like the charges in the instant case) had been suspended for the statutory seven-month period, the Court stated:

> ". . . we cannot suppose that Congress, by vesting the new suspension power in the Commission, intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head.
>
> "Moreover, Congress engaged in a protracted controversy concerning the period for which the Commission might suspend a change of rates. Such a controversy would have been a futile exercise unless the Congress also meant to foreclose judicial power to extend that period." 372 U.S. at 664.

• • •

> "We cannot believe that Congress would have given such detailed consideration to the period of suspension unless *it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief.*" Id. at 667 (emphasis added).
>
> • • •
>
> "There is, of course, a close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates, a jurisdiction to which this Court had, even in 1910, already given the fullest recognition. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U.S. 426, 51 L.Ed. 553, 27 S. Ct. 350. This relationship suggests it would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive." Id. at 668 (footnote omitted).

The power which the Court below purported to exercise is precisely the power which this Court held in *Arrow* was withdrawn by Congress from the judiciary. Thus, the District Court's action is not only in square conflict with *Arrow* but also is patently beyond the jurisdiction of any federal court.

The sole factual difference between the instant case and *Arrow* is that there the Commission § 15(7) proceeding had not been consummated at the time a judicial suspension was initially sought in the District Court.* As Chief Judge Friendly of the Second Circuit held in *National Small*

* However, at the time of this Court's decision, Division 2 had announced its decision sustaining the challenged tariffs, and that decision was awaiting possible reconsideration by the Commission. 372 U.S. at 660 footnote 2. The whole thrust of the *Arrow* opinion is flatly contrary to any notion that the injunction remedy prohibited by *Arrow* would suddenly become available as soon as the Commission disposed of the petition for reconsideration.

*Shipments Traffic Conference, Inc.* v. *United States*, 321 F. Supp. 500, 515 (S.D.N.Y. 1970), a case involving § 216(g) of the Interstate Commerce Act,* this factual difference has no legal significance:

> "The tariff has already been suspended for the full period allowed by Section 216(g), indeed even longer as a result of the carriers' agreement; and the rates were placed in effect as a result of the carriers' action, not the Commission's. If the Commission had simply failed to conclude its investigation before the end of the suspension period and the carriers had placed Tariff 500 in effect, *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), would clearly preclude us from enjoining application of the rates. We see no relevant difference with respect to our power to do this in the fact that the Commission here concluded its labors and found, although without adequate justification in our view, that the carriers had sustained their burden of showing the rates to be just and reasonable. *In neither situation can we direct the Commission to reinstitute a suspension which has already continued as long as Congress allows.*" (Emphasis added.)

Congress, as both the *Arrow* and *National Small Shipments* decisions recognize, "vest[ed] in the Commission the sole and exclusive power to suspend" (372 U.S. at 667), and the judgment below is in direct conflict with both those decisions.

## II. THE COURT BELOW APPLIED PATENTLY ERRONEOUS LEGAL STANDARDS OF JUDICIAL REVIEW.

The Court below not only intruded into the Commission's exclusive suspension power under § 15(7), but also applied patently erroneous legal standards of judicial review.

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*49 U.S.C. § 316(g). Section 216(g) is applicable to motor carriers under Part II of the Act and contains the same statutory suspension language as § 15(7).

It would seem axiomatic that the first task of a reviewing court is to consider the agency's findings. Here, the Commission made four "chief subsidiary findings that lead [it] to the ultimate conclusion that the considered schedules are just and reasonable":

> (1) that in-transit inspection is no longer essential to the orderly marketing of grain;
>
> (2) *that the line-haul rates even when increased by the proposed charges do not exceed the maximum reasonable level prescribed by the Commission;*
>
> (3) that (based on detailed detention and cost studies) the proposed charges are themselves just and reasonable for the service to be rendered; and
>
> (4) that "the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply".

The Court below appears to have sustained these findings (App. C2-3). But the Court then proceeded, for all practical purposes, to ignore them. Instead, the Court based its entire decision on its dissatisfaction with a Commission *dictum* setting forth a subordinate ground for distinguishing a prior Commission decision.

In its opinion, as distinguished from its "chief subsidiary findings", the Commission noted that its prior decision in *Transit Charges, Southern Territory,* 332 I.C.C. 664 (1968),* was distinguishable in two respects. Preliminarily, the Commission commented on the impracticality of requiring detailed analysis of every line-haul rate in-

* The Commission's order was sustained, on other grounds, in *Cin. N. O. & T.P.R. Co.* v. *United States* (unreported) (S.D. Ohio 1970), aff'd per curiam, 400 U.S. 932 (1970).

volved.* But the Commission's opinion then states (App. A32-33): "However, there is a more significant distinguishing feature that persuades us that the prior decision is not controlling here"—*i.e.*, "that the line-haul rate applicable to any movement of grain within the West when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission" and that "In no instance will the combined rate and charge exceed the maximum level prescribed. . . ." In its "chief subsidiary findings", the Commission relied exclusively on this second "more significant" distinction, stating that "Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra*" (App. A51).

The Court below, however, disregarded the Commission's findings and analysis, and instead seized on the Commission's *dictum* as a basis for setting aside the Commission's order. According to the Court's extraordinary reconstruction of the Commission's decision (App. C5-6):

> "In effect, the Commission 'excuses' the respondent railroads in the case before us from meeting the substantial proof requirement in satisfaction of its long established rule predicated upon the rail carriers 'inability' to meet that obligation here. In other words, the rule is viable and applicable where the Commission

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*"As indicated, approximately 480,000 in-transit inspections took place in 1969 at various points throughout the western district. The line-haul rates applicable on the grain to, from, and through those inspection points number in the thousands and, because of the complexities of the grain rate structure, vary to a large degree. A requirement that the reasonableness of the proposed charges cannot be determined without 'reference to the line-haul rates, the services furnished thereunder, and the cost thereof,' effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge." (App. A32). The Commission's language bears a striking similarity to this Court's statement in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 689 (1943) (see *infra*, p. 18).

> determines that the railroads are 'able' to carry the burden of proof but it is not applicable in those instances where the Commission determines that the rail carriers are unable to do so. Such a departure is impermissible."
>
> • • •
>
> "The Commission in the case at bar did not 'explain its departure' from its prior norm by its contention that this case can be 'distinguished' on the apparent proposition that here the railroads were unable to marshal and present substantial evidence to meet the requirements of the norm. The Commission has unwittingly, we believe, adopted an evidentiary rule which is discriminatory per se. . . ."

The Court's reasoning is defective on an abundance of grounds:

First of all, even the most casual examination of the Commission decision demonstrates that the District Court's restatement of the Commission's position does not even remotely resemble what the agency actually decided. Both in its opinion and particularly its findings, the Commission made it as clear as language will permit that "the more significant distinguishing feature that persuades us" is that the total of the line-haul rate and the inspection charge still did not exceed the maximum reasonable level. The Commission did not "excuse" anyone from meeting a requirement; and it did not, unwittingly or otherwise, adopt a "discriminatory" evidentiary rule.

Second, it is a wholly improper exercise of judicial review to base the Court's decision, not on the agency's findings, but on a *dictum* torn from the the context of the agency's opinion. Where, as here, the agency carefully enumerates its findings, surely minimal standards of judicial review require that the reviewing court address itself to those findings—rather than concentrate on a single *dictum* and then, remarkably, set aside the agency's order on the ground that the agency did not adequately explain its decision.

Third, the Commission is not rigidly bound by a doctrine of *stare decisis*. As this Court held in *Virginian Ry.* v. *United States*, 272 U.S. 658, 665-6 (1927), a reviewing court "has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or *with the alleged inconsistency of findings made in other proceedings before it.*" (Emphasis added.) The District Court's attempt to restrict the Commission to a supposed "norm" constitutes an improper encroachment upon the authority of the Commission to deal with matters vital to the national transportation system—here, the serious nationwide shortage of freight cars.*

Fourth and finally, the whole premise of the District Court's opinion—*i.e.*, that the Commission "departed" from some "norm" but failed to adequately explain why—is demonstrably false. Contrary to that premise, the Commission did not "depart" from any "norm", and the Court's attempted reliance on *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954), is wholly misplaced.

The Court below (App. C4-5) imputed to the Commission a "long established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom. . . ." If the District Court means by this "rule" a requirement that the Commission in a § 15(7) proceeding must make a definitive adjudication of every individual line-haul rate involved,

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* See 49 U.S.C. § 15a(2), which provides in pertinent part: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, . . . to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; . . ."

there clearly is no such "rule". Such a requirement, this Court held in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943), would be contrary to the limited purpose of § 15(7). In language remarkably applicable to the instant case, the Court pointed out (p. 689):

> "The construction contended for would have the effect either of imposing a practically impossible burden upon the Commission or of making resort to the Commission's powers under § 15(7) so rare as to make such powers of little practical significance. Suspension cases are very numerous, and in many of them the construction contended for would require the Commission to 'readjust the entire rate structure of an important section of the country.'"

Moreover, the Court held (p. 687) that rates not specifically adjudicated in a § 15(7) proceeding ". . . stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations". Such rates may still be challenged through, *e.g.*, a complaint proceeding under Section 13(1) of the Act, 49 U.S.C. § 13(1), or by a request that a lower maximum level be established under Section 15(1), 49 U.S.C. § 15(1).

On the other hand, if the District Court means by the stated "rule" that the Commission in such cases has usually considered not only the reasonableness of the proposed charge for the service but also the overall reasonableness of the combination of the proposed charges and the line-haul rates,* then the Commission's decision here is in full

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* *E.g., Lighterage and Storage Regulations at New York,* 35 I.C.C. 47, 61 (1915) (separate charge cannot be allowed "without taking into consideration" the aggregate charges); *Reconsignment Case No. 3,* 53 I.C.C. 455, 468-69 (1919) (same; also stresses importance of whether inspection is required by federal law); *Unloading Lumber to New York Harbor,* 256 I.C.C. 463, 468 (1943) (requires "an adequate showing" that the aggregate charges are reasonable).

accord with such a "rule"; for the Commission specifically found that the combination did not exceed the maximum reasonable level (App. A33, A51, B4).

By contrast, in the *Transit Charges* case, it was found *inter alia* that "the imposition of the proposed additional $22 per car *may well result in rates and charges which exceed reasonable maxima*" (332 I.C.C. at 686) (emphasis added). And in *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954), it appears that the Commission made no determination of the reasonableness of the aggregate charges.

Furthermore, the nature of the service involved in *Secretary of Agriculture* v. *United States* was fundamentally different. At issue there was a special charge for unloading which had to be performed by the carrier since the goods were not accessible to the consignees. The Court pointed out that "the unloading is an essential part of the delivery and hence is necessarily encompassed in the line-haul" (347 U.S. at 652). In such cases, where the service involved is, by law or otherwise, an integral part of the line-haul transportation, closer scrutiny of the line-haul rate is usually required.* By contrast, the Commission in the instant case found that "it is not essential that the grade of grain be determined while the particular shipment is in transit on the railroad" (App. A12); that, by virtue of the 1968 amendment, "in-transit inspection is now permissive under the Federal statutes and can be omitted entirely or made through samples taken prior to tender at origin or subsequent to delivery at destination" (App. A13); that "There are numerous shipments of the grain where in-transit in-

* See also, *e.g.*, *Unloading Lumber at New York Harbor*, 256 I.C.C. 463, 468 (1943) ("The nature and incidents of the unloading service here considered establish beyond a doubt that it is inextricably bound up with the line-haul service"); *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673, 676 (1943) ("Switching or drayage . . . are not special services . . . but are a part of the through transportation service").

spections are not performed" (App. A13); that "The basic responsibility of the railroads does not require them to provide the service for in-transit inspection" (App. A13); and that such inspection "is an accessorial service for which a charge separate from the line-haul rates may properly be assessed" (App. A14).

Only by disregarding these and other findings of the Commission could the District Court infer some "departure" from an alleged Commission "norm". Furthermore, "In dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions". *Secretary of Agriculture* v. *United States*, 347 U.S. at 652. In that case, unlike this one, the service was one "necessarily encompassed in the line-haul" (pp. 652, 654) and the Commission had failed to consider—as it did here—the reasonableness of the aggregate charges. Yet, even in that situation, the Court emphasized that ". . . the Commission was not precluded from following a procedure fairly adapted to the unique circumstances of this case" (p. 652).

Here, given "the unique circumstances of this case", the Commission concluded that in-transit grain inspections are *not* an integral part of the line-haul transportation but, in fact, a serious *interruption* which the Commission determined is a significant factor in the nationwide freight car shortage problem. The Commission approved the proposed charges not so much as compensation for a service (although the Commission carefully determined that the charges were just and reasonable for the service performed) but as a deterrent to in-transit inspections that unnecessarily tie up badly needed freight cars.

The decision of the District Court, however, ignores "the unique circumstances of this case" set forth in the Commission's findings and conclusions, misconceives the nature

and scope of a § 15(7) proceeding, and violates the most basic standards of judicial review.

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For the foregoing reasons, it is respectfully submitted that the questions presented by this appeal are substantial and of public importance and that an order noting probable jurisdiction should be entered.

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